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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 475

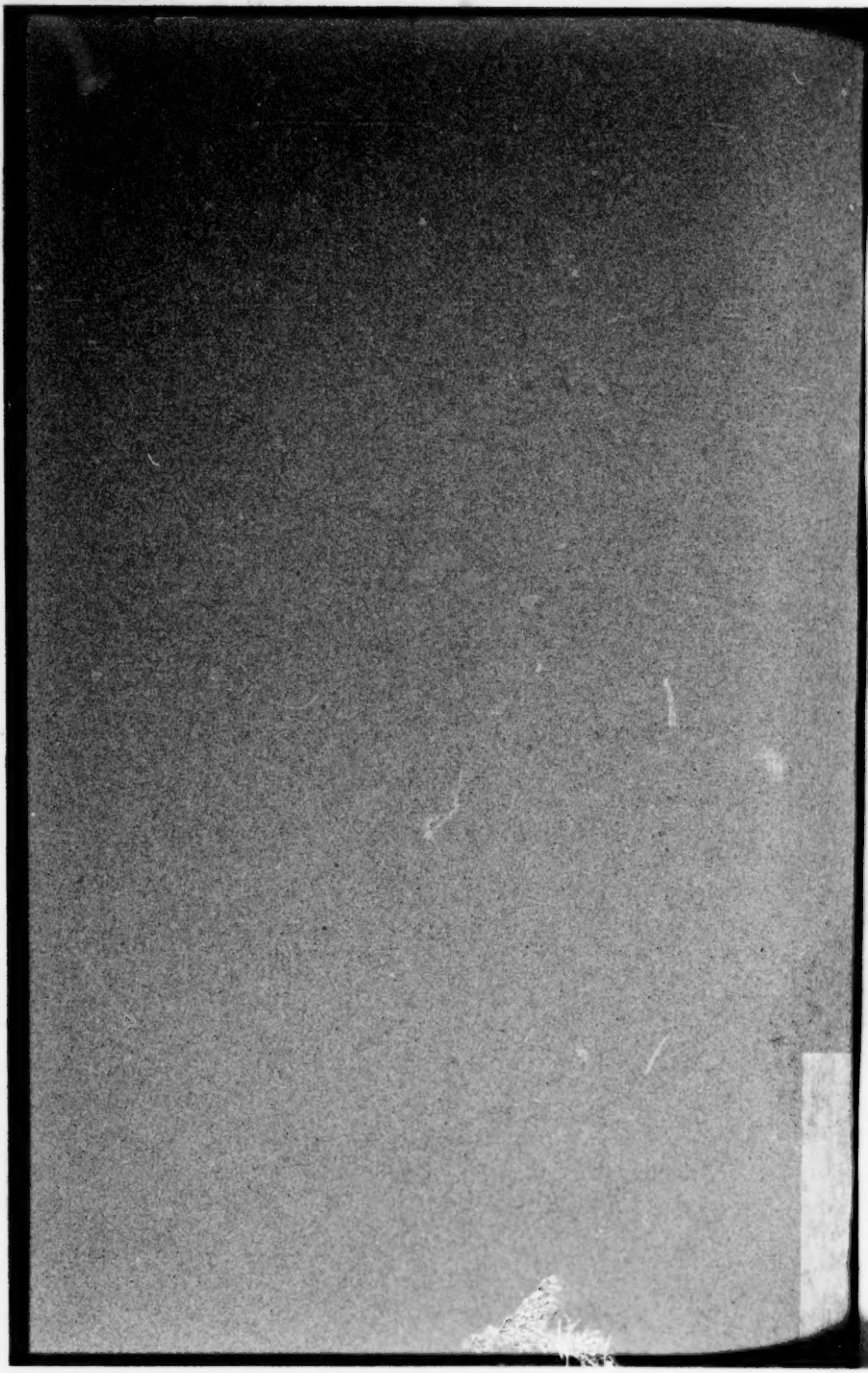
DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

S. & L. BUILDING CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 25, 1932
CERTIORARI GRANTED DECEMBER 5, 1932



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 475

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

VS.

S. & L. BUILDING CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 Before United States Board of Tax Appeals

Docket No. 36950

S. AND L. BUILDING CORP., PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearances: For petitioner, Geo. W. Perper, Esq.; for respondent: F. R. Shearer, Esq., and E. L. Corbin, Esq.

1928

Apr. 2—Petition received and filed. Taxpayer notified. Fee paid.
Apr. 3—Copy of petition served on general counsel.
June 2—Motion for extension to 9/2/28 to answer filed by general counsel. Granted.
Sept. 1—Motion for extension to 12/2/28 to answer filed by general counsel. Granted.
Dec. 3—Motion for extension to 4/2/29 to answer filed by general counsel. Granted.

1929

Apr. 2—Answer filed by general counsel.
Apr. 5—Copy of answer served on taxpayer; assigned to general calendar.
Nov. 25—Hearing set 2/3/30.

2 1930

Feb. 3—Hearing held before Mr. Black on merits; no briefs.
Feb. 6—Transcript of hearing 2/3/30 filed.
Feb. 14—Amended petition filed.
Feb. 20—Answer to amended petition filed by general counsel.
Apr. 30—Findings of fact and opinion rendered, Eugene Black, division 15. Judgment will be entered under rule 50.
June 17—Notice of settlement filed by general counsel.
June 20—Hearing set July 9, 1930, under rule 50.
July 3—Motion to continue hearing to July 30, 1930, filed by general counsel.
July 9—Hearing held before Mr. Phillips under rule 50. On motion of respondent continued to July 30.
July 9—Order of continuance to day calendar of July 30, 1930, entered.
July 17—Notice of objections to proposed redetermination filed by taxpayer. Copy served 7/18/30.
July 30—Hearing held before Mr. Black on contested settlement under rule 50.
Aug. 20—Transcript of hearing July 30, 1930, filed.
Sept. 16—Order of redetermination entered, Eugene Black, division 15.

1931

Feb. 18—Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error filed by taxpayer.

3 Feb. 18—Præcipe filed.

Feb. 18—Proof of service filed—petition and præcipe.

Feb. 27—Motion for extension to March 7, 1931, to file objections to præcipe filed by general counsel. Granted.

Now, March 7, 1931, the foregoing docket entries certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

[Title omitted.]

Petition

Filed April 2, 1928

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:FAR:A-6-MN-60D)

4 dated February 4, 1928, and as a basis of its proceedings alleges as follows:

1. The petitioner is a New York corporation with its principal office at 2382 Grand Concourse, New York, N. Y.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the taxpayer on February 4, 1928.

3. The amount of the deficiency is $34,342.08 for income taxes for the calendar years 1924 and 1925 and the amount thereof in controversy is seven thousand nine hundred and eighty-six and 89/100 dollars ($7,986.89).

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The failure of the commissioner to allow the full amount of mortgage expense and fees incurred in connection with 82nd Street and Broadway and 83rd Street and Broadway properties.

(b) The commissioner has in error allowed as a deduction the mortgage fees and expense in connection with 82nd Street and Broadway and 83rd Street and Broadway properties in the years 1924 and 1925 instead of in the years 1923 and 1924.

(c) That the statutory net loss for the year 1923, applied as a deduction by the commissioner for the year 1924 has been incorrectly computed.

5 (d) The commissioner failed to eliminate from the 1924 income an item representing adjustments of cost of premises 2608 Creston Avenue sold by petitioner in the year 1922.

(e) The commissioner incorrectly computed the taxable profit on Broadway and 83rd Street property sold in the year 1925 by his failure to properly apply the installment sales provision of the law.

5. The facts upon which the taxpayer relies as the basis of this proceeding are as follows:

(a) The total mortgage expenses and fees re 82nd Street and Broadway property amounted to $97,627.50. (See revenue agent's revised report dated December 29, 1927, page seven (7) thereof.) The commissioner, in error, took as a deduction (see page 5, Exhibit A, attached) $91,008.75 instead of the total fees incurred of $97,627.50.

(b) The total mortgage expenses and fees re 83rd Street and Broadway property amounted to $179,500.00. (See revenue agent's revised report dated December 29, 1927, page seven (7) thereof.) The commissioner, in error, took as a deduction (see page seven, Exhibit A, hereto attached) $161,550.00 instead of the total fees incurred of $179,500.00.

(c) The mortgage fees and expenses of $97,627.50 re 82nd Street and Broadway property were incurred in the year 1923 and the
6 mortgage fees and expenses of $179,500.00 re 83rd Street and Broadway property were incurred in the year 1924. (See revenue agent's revised report dated December 29, 1927, page seven (7) thereof.) The commissioner, therefore, was in error in deducting these items for the years 1924 and 1925, respectively. (See pages 5 and 7 of report dated February 4, 1928, Exhibit A, hereto attached.)

(d) The mortgage fees and expenses incurred in the year 1923 of $97,627.50 re 82nd Street and Broadway property should have been deducted by the commissioner in said year 1923. (See item 5 (c) above.) The statutory net loss for 1923 of $2,525.26 (see page 5, Exhibit A, hereto attached) should be increased by the above amount of $97,627.50, resulting in a correct statutory net loss of $100,152.76, which amount should be applied in accordance with section 206 of the revenue act of 1924.

(e) Petitioner filed, on March 5th, 1928, a claim for refund for the calendar year 1923 showing thereon that the correct statutory net loss for said year 1923 amounts to $100,152.76, which amount should be applied in accordance with section 206 of the revenue act of 1924.

(f) There has been included as income on page one (1) of the schedules attached to the 1924 corporation income-tax return filed by the petitioner, an item of $3,336.81 with the following explanation: "Premises 2608 Creston Avenue, sundry allowances received from
7 contractors after sale of premises."

(g) The property of 2608 Creston Avenue consisted of land and building which was constructed by petitioner. Said property was sold in the year 1922.

(h) The amount of $3,336.81 represents the aggregate reductions of cost of the property 2608 Creston Avenue, due to returns of furniture and equipment and sundry allowances and adjustments of construction contracts.

(i) The adjustments of $3,336.81 above referred to, reducing cost of premises 2608 Creston Avenue, were not made on the books of the company until the year 1924.

(j) The commissioner failed to eliminate from 1924 income the aggregate adjustments of $3,336.81 on property 2608 Creston Ave. sold in 1922. On the other hand, the commissioner eliminated a deduction taken by petitioner on page three (3) of the schedules attached to the 1923 income-tax return filed by him an item of $230.11. The explanation on the tax return for this item of $230.11 is as follows: "Premises 2608 Creston Avenue (& 193rd St.); sundry adjustments in 1923, premises sold in 1922.

(k) The premises located at 83rd Street and Broadway, New York City, was sold by petitioner April 15th, 1925, for $2,165,000.00.

(l) This property at 83rd Street and Broadway was sold subject to an existing first mortgage of $1,100,000.00 and existing second mortgage of $500,000.00.

8 (m) The petitioner received from the purchaser during the taxable year 1925, on the sale of the 83rd Street and Broadway property, $265,000.00 in a purchase-money mortgage, on account of which $2,000.00 of cash installments were paid during the year 1925. The petitioner also received $300,000.00 in cash from purchaser on sale of said premises, making the total cash received from the purchaser during the year 1925, $302,000.00.

(n) The gross profit on sale of 83rd Street and Broadway, after deducting from the purchase price the net cost of $1,522,033.00 amounts to $642,967.00.

(o) The total contract price on sale of 83rd Street and Broadway amounts to $565,000.00.

(p) The initial payment on sale of 83rd Street and Broadway amounts to $302,000.00.

(q) The gross profit of $642,967.00 to be realized on sale of 83rd Street and Broadway is 113.8% of the total contract price of $565,000.00.

(r) The correct method of reporting the taxable profit on installment basis for the year on sale of 83rd Street and Broadway property is 113.8% of the initial payment of $302,000.00 and the profit is $343,676.00.

(s) The petitioner included in his 1925 income-tax return filed profit of $2,234.56 on sale of above property. (See revenue agent's report dated June 6, 1927, Exhibit P.)

9 (t) The correct increase in taxable profit for the year 1925 on the sale of 83rd Street and Broadway is $341,441.44, representing the difference between $343,676.00 and $2,234.56, as shown above, instead of $377,732.44 as shown on page six (6) of commissioner's letter dated February 4, 1928, Exhibit A, hereto attached.

6. Wherefore, the petitioner prays that this board may hear the proceedings and determine that the full amount of mortgage fees and expenses in re 82nd Street and 83rd Street and Broadway properties be allowed in the years 1923 and 1924; that the correct statutory

net loss for the year 1923 be applied to the subsequent years according to law; that adjustments of cost of premises 2608 Creston Avenue be eliminated from the 1924 income; that the taxable profit on 83rd Street and Broadway property be computed on the installment-sales basis of 113.8% of the initial payment of $302,000.00; that there is no deficiency for the year 1924; that the statutory net loss for the year 1924 be applied to the year 1925; that the deficiency for the year 1925 is $26,355.19.

GEORGE W. PERPER,
Counsel for Petitioner,
11 West 42nd Street, Manhattan Borough, New York City.

10 [*Duly sworn to by Sam Minskoff; jurat omitted in printing.*]

11 *Exhibit A to petition*

[SEAL.]

Address reply to Commissioner of Internal Revenue and refer to IT:FAR:A-6-MN-60D.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Feb. 4, 1928.

S. AND L. BUILDING CORPORATION,
2382 Grand Concourse, New York, New York.

SIR: In accordance with section 274 of the revenue act of 1926 you are advised that the determination of your tax liability for the years 1923, 1924, and 1925 discloses a deficiency of $34,342.08 for the years 1924 and 1925 and an overassessment of $5,255.31 for the year 1923, as shown in the attached statement.

The section of the law above mentioned allows you an appeal to the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter. However, if you acquiesce in this determination, you are requested to execute the enclosed

12 Form A and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

Respectfully,

D. H. BLAIR, *Commissioner.*
By C. B. ALLEN, *Deputy Commissioner.*

Enclosures: Statement; Form A; Form 882.

STATEMENT

IT:FAR:A-6-MN-60D.

In re S. and L. Building Corporation, 2382 Grand Concourse, New York, New York.

Year	Deficiency in tax	Overassessment
1923		$5,255.31
1924	$394.69	
1925	33,947.39	
Total	$34,342.08	$5,255.31

Net deficiency, $29,086.77

Reference is made to your protest dated October 27, 1927, against the determination of your tax liability as set forth in bureau letter dated October 21, 1927, covering the years 1923 to 1925, inclusive.

13 You are advised that after due consideration of your protest, together with the information submitted during the conference held November 16, 1927, and the subsequent information submitted in your brief dated December 15, 1927, your tax liability has been redetermined in accordance with your contentions wherein the fees for raising mortgage loans were allowed as a deduction in the year in which incurred.

The result of the determination, in accordance with the foregoing conclusions, is as follows:

1923

Net income as reported		$42,042.53
Additions:		
1. 1922 expenses	$230.11	
2. Profit on sale of real estate	14,000.00	
		14,230.11
		$56,272.64
Deductions:		
3. Excessive profit on sale of real estate	$5,987.27	
4. Post sale expenses	32.25	
5. Additional depreciation, 82nd Street and Broadway	8,418.74	
6. Increase depreciation	10,054.84	
7. Expenses paid in 1926	1,000.00	
8. Excess of fees incurred and paid	33,815.41	
		59,308.51
Net income as adjusted (loss)		($3,035.87)

14 EXPLANATION OF ADJUSTMENTS

(1) This represents 1922 expenses of Post sale items paid in 1923 in connection with property which was sold in 1922.

(2) Since the profit on sale of northwest corner of Kingsbridge Road and Creston Avenue is a completed transaction, which sale was consummated during the year 1923, the amount of $6,000.00 received during the year 1924 and the amount of $8,000.00 received during the year 1925 have been considered income during the current year and the income for the years 1924 and 1925 has been reduced by $6,000.00 and $8,000.00, respectively.

(3) The property of 2055-2065 Creston Avenue having been sold and treated as a completed transaction during the year 1923, the bills for furnishings and equipment amounting to $5,987.27, which were received and paid during the year 1924, have been allowed as a deduction for the current year.

(4) Post sale expenses of $32.25 represents items paid in 1924 in connection with the property at northwest corner of Kingsbridge Road and Creston Avenue, which was sold in 1923.

(5) In accordance with your claim for additional depreciation on property 82nd Street and Broadway, your contention has been allowed and depreciation increased in the amount of $8,418.74 in accordance with Schedule 1–A, revised, of the revenue agent's report.

15 (6) Increased depreciation has been allowed at the rate of 3%, as claimed in your brief. The increase of $10,054.84, as set forth by the agent in his report under item D, Schedule 1–A, Revised, has been reviewed and approved.

(7) The item of $1,000.00 as expenses paid during the year 1926, account of northwest corner Kingsbridge Road and Creston Avenue, has been allowed.

(8) This item represents the excess of the mortgage expense fees incurred and paid over the amount deducted on the return. This is allowed in accordance with your protest and computed as follows:

Fees incurred (in accordance with your schedule attached to your letter dated December 15, 1927)		$65,849.54
Less:		
Deductions taken on return	$25,415.38	
82nd Street and Broadway	6,618.75	32,034.13
Difference		$33,815.41
Computation of tax:		
Net income (loss)		($3,035.87)
Tax liability		None.
Original assessment, account #404739		5,255.31
Overassessment		$5,255.31

16

1924

Net income as reported (loss)		($67,574.31)
Additions:		
1. Additional cost of 2055–2065 Creston Avenue	$5,987.27	
2. Profit on sale of premises 82nd Street and Broadway	184,363.25	
3. Expenses, northwest corner Kingsbridge Road and Creston Avenue	32.25	190,382.77
Total		$122,808.46
Deductions:		
4. Purchase-money mortgage receipts	$6,000.00	
5. Commissions, etc	22,217.00	
6. Depreciation, 82nd Street and Broadway	2,806.25	
7. Depreciation, 83rd Street and Broadway	8,250.10	
8. Increase depreciation	11,186.55	
9. Excess of fees incurred and paid	64,665.75	115,125.65
Net income as adjusted		$7,682.81

17

EXPLANATION OF ADJUSTMENTS FOR 1924

(1) See explanation of item (3) for the year 1923.

(2) The profit on the sale of the premises, 82nd Street and Broadway, has been approved as computed by the agent, the details of which are shown in Exhibit O, revised and amended.

(3) See explanation of item (4) for the year 1923.

(4) See explanation of item (2) for the year 1923.

(5) Commissions, etc., have been increased by $22,217.00 to allow as a deduction the expenses of sale of property, 82nd Street and Broadway, which expenses were deferred until 1925.

(6) Depreciation on the property at 82nd Street and Broadway has been allowed in the amount of $2,806.25 up to February 1, 1924, date of sale of property.

(7) Depreciation on the property at 82nd Street and Broadway has been increased by $8,250.10 to allow depreciation from October 1, 1924, to the end of the year in accordance with details as set out by the agent under Schedule 3–A, revised, item D.

(8) Depreciation has been increased from 2% to 3% in
18 accordance with the computation as set forth in the agent's report under item E. Schedule 3–A, revised.

(9) See explanation of item (8) for the year 1923.

Fees incurred:		
1325 Grand Concourse		$10,525.00
82nd Street and Broadway		91,008.75
Total		$101,533.75
Deductions taken:		
2665 Grand Concourse	$11,838.50	
180th Street and Boston Road	3,375.00	
2382 Grand Concourse	2,652.00	
1325 Grand Concourse	1,052.50	
Broadway, 82nd and 83rd Streets	17,950.00	36,868.00
Difference		$64,665.75
Computation of tax:		
Net income		$7,682.81
Less:		
Net loss (section 206, revenue act of 1924)	$2,525.26	
Exemption	2,000.00	4,525.26
Balance taxable at 12½%		$3,157.55
Tax liability		394.69
Previously assessed		None.
Deficiency		$394.69

19 Computation of statutory loss for 1923:

Net loss	$3,035.87
Nontaxable interest	510.61
Statutory loss	$2,525.26

1925

Net income as reported (loss)		($28,040.46)
Additions:		
1. Profit on real estate, 83rd Street and Broadway	$377,732.44	
2. Profit on real estate, 82nd Street and Broadway	20,252.02	
3. Commissions	22,217.00	
4. Profit on real estate, 180th Street and Boston Road	3,618.92	
5. Net loss for 1924	67,574.31	$491,394.69
Total		$463,354.23

Deductions:		
6. Purchase money mortgage receipts	$8,000.00	
7. Commissions	21,000.00	
8. Post sale expenses	4,960.59	
9. Depreciation, 83rd Street and Broadway	9,625.12	
10. Depreciation, 2665 Grand Concourse	12,150.86	
11. Excess of fees incurred and paid	146,483.92	202,220.49
Net income as adjusted		$261,133.74

20

EXPLANATION OF ADJUSTMENTS

(1) Profit on sale of property at 83rd Street and Broadway has been approved as computed by the agent under Exhibit O, revised and amended.

(2) The profit on the sale of property, 82nd Street and Broadway, has been approved as computed by the agent under Exhibit P, revised and amended.

(3) Commissions have been decreased by $22,217.00, representing amount paid on the sale of property at 82nd Street and Broadway and which has been allowed as a deduction during the year 1924.

(4) The profit on sale of property at 180th Street and Boston Road has been increased by $3,618.92 on account of additional depreciation allowed during the years 1923 and 1924.

(5) Since there is a gain disclosed for the year 1924, the net loss as deducted has been disallowed.

(6) See explanation of item (2) for the year 1923.

(7) Commissions have been increased $21,000.00 to allow as an expense the amount paid on the sale of property of 83rd Street and Broadway.

(8) Post sale expenses of $4,960.59 paid in 1926 have been allowed during the current year and are made up of $4,500.00 expenses
21 in connection with the property, 180th Street and Boston Road, sold in 1925, and $460.59 of sundry accruals.

(9) Depreciation of the property, 83rd Street and Broadway, has been increased by $9,625.12.

(10) Depreciation has been increased from 2% to 3% in accordance with the computation as set out in item F, Schedule 5-A, revised.

(11) See explanation of item (8) for the year 1924.

Fees incurred:		
Listed in accordance with your schedule	$88,076.25	
83rd Street and Broadway property	161,550.00	
	$249,626.25	
Less: Deductions taken on return per schedule	103,142.33	
Difference	$146,483.92	
Computation of tax:		
Net income	$261,133.74	
Less: Exemption	None.	
Balance taxable at 13%	$261,133.74	
Tax liability	$33,947.39	
Original assessment	None.	
Deficiency	$33,947.39	

22 The right of petition as indicated on page one of this letter refers only to any deficiency in tax indicated herein, inasmuch as there is no provision in the revenue act of 1926 granting the right of petition against the determination of any overassessment found upon an audit of your return.

The overassessment shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district, and will be applied by that official in accordance with section 284 of the revenue act of 1926.

A copy of this communication has been furnished your representative, Mr. George W. Perper, 11 West 42nd Street, New York, New York.

Payment of the tax should not be made until a bill is received from the collector of internal revenue for your district, and remittance should then be made to him.

Now, March 7, 1931, the foregoing petition certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

23 Before United States Board of Tax Appeals

[Title omitted.]

Answer

Filed April 2, 1929

Admits the allegation contained in paragraph 1 of the petition.

Admits the allegation contained in paragraph 2 of the petition.

Admits that the deficiency is for income taxes for the calendar years 1924 and 1925 as alleged in paragraph 3 of the petition, but denies that the amount thereof is $7,986.89.

Denies the allegations of error as set forth in paragraph 4 of the petition.

Denies all the allegations of fact contained in paragraph 5 of the petition.

Denies each and every allegation of fact contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore it is prayed that the determination of the commissioner be approved and that the appeal be dismissed.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

24 Of counsel:
F. R. SHEARER,
E. L. CORBIN,
Special Attorneys, Bureau of Internal Revenue.

Now, March 7, 1931, the foregoing answer certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

[Title omitted.]

Amended petition

Filed Feb. 14, 1930

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:FAR:A-6-MN-60D) dated
25 February 4, 1928, and as a basis of its proceedings alleges as follows:

1. The petitioner is a New York corporation with its principal office at 2382 Grand Concourse, New York, N. Y.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the taxpayer on February 4, 1928.

3. (A) The amount of the deficiency is $34,342.08 for income taxes for the calendar years 1924 and 1925.

(B) The full amount of this deficiency is in controversy for the reason that for the year 1924 a net loss of $174,226.13 is determined and for the year 1925 a net loss of $131,959.39 is determined after applying the statutory net losses found for the year 1923 of $100,-152.76 and for the year 1924 of $174,226.13.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(A) The commissioner in his 60-day letter attached hereto allowed mortgage fees to be deducted in the years incurred, but failed to allow the full amount of mortgage fees incurred on mortgage loans in connection with 82nd St. & Broadway and 83rd St. & Broadway properties.

(B) The commissioner has in error allowed as a deduction
26 the fees on mortgage loans in connection with 82nd St. & Broadway and 83rd St. & Broadway properties in the years 1924 and 1925, instead of in the years 1923 and 1924, respectively, when said mortgage fees were incurred.

(C) That the statutory net loss for the year 1923, allowed as a deduction by the commissioner in the year 1924, has been incorrectly computed.

(D) The commissioner failed to eliminate from the 1924 income an item representing adjustments of cost of premises, 2608 Creston Avenue, sold by petitioner in the year 1922.

(E) The commissioner incorrectly computed taxable profit on Broadway & 83rd St. property sold in the year 1925 by his failure to properly apply the installment-sales provision of the law.

(F) The commissioner incorrectly computed the taxable profit on Broadway & 82nd St. property sold in the year 1924 by his failure to properly apply the installment-sales provision of the law.

5. The facts upon which the taxpayer relies as the basis of this proceeding are as follows:

(A) The total fees incurred on mortgage loans in connection with 82nd St. & Broadway property amounted to $97,627.50. The commissioner in error allowed as a deduction only $91,008.75.

27 (B) The total fees incurred on mortgage loans in connection with 83rd St. & Broadway property amounted to $179,500.00. The commissioner, in error, allowed as a deduction only $161,550.00.

(C) The mortgage fees of $97,627.50 re 82nd St. & Broadway loan were incurred in the year 1923, and the mortgage fees of $179,500.00 re 83rd St. & Broadway loan were incurred in the year 1924. The commissioner allowed as a deduction in the 60-day letter (Exhibit A, page 3, attached hereto) only $65,849.54 for fees incurred in the year 1923. The correct amount of fees incurred in the year 1923 is $163,477.04, a difference of $97,627.50. For the year 1924 the commissioner allowed as a deduction in the 60-day letter (Exhibit A, page 5, attached hereto) only $101,533.75 for fees incurred in the year 1924. The correct amount of fees incurred in the year 1924 is $190,025.00, a difference of $88,491.25. For the year 1925 the commissioner allowed as a deduction in the 60-day letter (Exhibit A, page 7, attached hereto) $249,626.25 for fees incurred in the year 1925. The correct amount of fees incurred in the year 1925 is $88,076.25, a difference of $161,550.00, representing excess deductions allowed by the commissioner.

(D) The statutory net loss for 1923 of $2,525.26 (see Exhibit A, page 5, hereto attached) should be increased by $97,627.50 (see C above, relating to correct amount of mortgage fees to be deducted for the year 1923), resulting in a correct statutory net loss of

28 $100,152.76. This net loss should be applied in accordance with section 206 of the revenue act of 1924.

(E) Petitioner filed on March 5th, 1928, a claim for refund for the year 1923, in the amount of $5,255.31, showing thereon that the correct statutory net loss for said year 1923 amounts to $100,152.76, which amount should be applied in accordance with section 206 of the revenue act of 1924.

(F) There has been included as income on page 1 of schedules attached to the 1924 corporation income-tax return filed by petitioner an item of $3,336.81 with the following explanation: "Premises 2608 Creston Avenue, sundry allowances received from contractors after sale of premises."

(G) The property of 2608 Creston Avenue consisted of land and building which was constructed by petitioner. Said property was sold in the year 1922.

(H) The amount of $3,336.81 represents the aggregate reduction of cost of the property 2608 Creston Avenue, due to returns of furniture and equipment, sundry allowances, and adjustments of construction contracts.

(I) The adjustments of $3,336.81, above referred to, reducing cost of premises 2608 Creston Avenue, were not made on the books of the company until the year 1924.

29 (J) The commissioner failed to eliminate from 1924 income the aggregate adjustments of $3,336.81 on property 2608 Creston Avenue sold in 1922. On the other hand, the commissioner eliminated a deduction taken by the petitioner on page three (3) of schedules attached to the 1923 income-tax return filed by them, an item of $230.11. The explanation on the tax return for this of $230.11 is as follows: " Premises 2608 Creston Avenue (& 193rd St.); sundry adjustments in 1923, premises sold in 1922."

(K) The premises located at 83rd St. & Broadway was sold by petitioner April 15th for $2,165,000.00.

(L) The mortgages existing on the 83rd St. & Broadway property at the time of the sale amounted to $1,600,000.00, consisting of 1st mortgage $1,100,000.00, and 2nd mortgage of $500,000.00, assumed by the purchaser.

(M) The petitioner received from the purchaser during the taxable year 1925 on the sale of 83rd St. & Broadway property a purchase-money mortgage of $265,000.00, on account of which $2,000.00 of cash installments were paid during the year 1925. The petitioner also received $300,000.00 in cash from purchaser on the sale from said premises, making total cash received from the purchaser during the year 1925 $302,000.00.

In addition thereto the purchaser of the 83rd St. & Broadway property paid during the year 1925 to the mortgagee an installment of $22,500.00 on account of the 2nd mortgage.

30 (N) The gross profit on sale of 83rd St. & Broadway after deducting from the purchase price the net cost of $1,522,033 amounts to $642,967.00.

(O) The total contract price on sale of 83rd St. & Broadway property amounts to $2,165,000.00. Petitioner refers to the decision in the case of S. J. Snyder, Trustee of the Estate of Bagby-Howe Drug Co., Bankrupt, vs. Robert H. Lucas, Collector of Internal Revenue for the Collection District of Kentucky, defendant, decided in the District Court of the United States for the Western District of Kentucky, August 3rd, 1929, decision #1068.

(P) The initial payment on sale of 83rd St. & Broadway property amounts to $324,500.00 (cash received on sale $300,000.00; installment received on purchase-money mortgage $2,000.00; installment paid on 2nd mortgage $22,500.00).

(Q) The gross profit of $642,967.00 to be realized on sale of 83rd St. & Broadway property is .29698245% of contract price of $2,165,000.00.

(R) The correct amount of profit computed according to the installment method and in accordance with the S. J. Snyder decision above referred to, applicable to the year 1925 on the sale of 83rd St. & Broadway property, is $96,370.80.

(S) The petitioner included in his 1925 income-tax return a profit of only $2,234.56 on the sale of 83rd St. & Broadway property.

31 (T) The commissioner reported a profit in the year 1925 on the sale of 83rd St. & Broadway property of $379,967.00 and

increased the profit reported by the taxpayer of $2,234.56 by $377,732.44. (Exhibit A, page 6, item #1.) The correct increase in taxable profit for the year 1925 should be $96,370.80 instead of $377,732.44, a difference of $281,361.64.

(U) (a) The premises at 82nd St. & Broadway were sold in the year 1924 for $2,100,000.00.

(b) The gross profit after deducting the net cost of $1,541,323.48 amounts to $558,676.52.

(c) The total contract price is $2,100,000. The initial payment in 1924 amounts to $352,000.00 (cash received on sale $300,000.00, installment of $30,000.00 received on purchase-money mortgage, and installment paid on first mortgage assumed $22,000.00).

(d) The gross profit of $558,676.52 to be realized on the sale of 82nd St. & Broadway property is .26603644% of the total contract price of $2,100,000.00 (based upon S. J. Snyder decision referred to above).

(e) The correct amount of profit applicable to the year 1924 is $93,644.83 instead of $184,363.25, as determined by the commissioner in his 60-day letter (see Exhibit A, page 3, item #2), a difference of $90,718.42.

(f) The correct amount of profit applicable to the year 1925 is $21,349.42 (.26603644% of $80,250.00, consisting of installment on purchase-money mortgage received in 1925 of $36,250 and
32 installment paid on first mortgage by purchaser to mortgagee of $44,000.00) instead of $20,252.02, as determined by the commissioner in his 60-day letter (see Exhibit A, page 6, item #2), a difference of $1,097.40, representing an additional amount of income for the year 1925 to be reported.

6. Wherefore, the petitioner prays that this board may hear the proceedings and determine that mortgage fees shall be allowed as a deduction in the years incurred and the proper amounts to be deducted for the years involved are: $163,477.04 for the year 1923, $190,025.00 for the year 1924, $88,076.25 for the year 1925; that the statutory net loss for the year 1923 to be applied to the subsequent years according to law is $100,152.76; that the item of $3,336.81 included as income for the year 1924 be eliminated from said year; that the S. J. Snyder case referred to herein be applied in determining the proper method for reporting income on the installment plan and according to this method the correct amount of taxable profit to be reported on 82nd St. & Broadway applicable to the year 1924 is $93,644.83, and for the year 1925 $21,349.42; and on 83rd St. & Broadway for the year 1925 $96,370.80; that there are no deficiencies for the years 1924 and 1925.

GEORGE W. PERPER,
Counsel for Petitioner,
11 West 42nd Street, Manhattan Borough, New York City.

33 [*Duly sworn to by Sam Minskoff; jurat omitted in printing.*]

34 *Exhibit A to amended petition*

[SEAL.]

Address reply to Commissioner of Internal Revenue and refer to IT:FAR:A-6-MN-60D.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Feb. 4, 1928.

S. AND L. BUILDING CORPORATION,
2382 Grand Concourse, New York, N. Y.

SIR: In accordance with section 274 of the revenue act of 1926 you are advised that the determination of your tax liability for the years 1923, 1924, and 1925 discloses a deficiency of $34,342.08 for the years 1924 and 1925 and an overassessment of $5,255.31 for the year 1923, as shown in the attached statement.

The section of the law above mentioned allows you an appeal to the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter. However, if you acquiesce in this determination, you are requested to execute the enclosed Form
35 A and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

Respectfully,

D. H. BLAIR, *Commissioner*,
By C. B. ALLEN,
Deputy Commissioner.

Enclosures: Statement; Form A; Form 882.

STATEMENT

IT:FAR:A-6-MN-60D.
In re S. and L. Building Corporation, 2382 Grand Concourse, New York, New York.

Year	Deficiency in tax	Overassessment
1923		$5,255.31
1924	$394.69	
1925	33,947.39	
Total	34,342.08	5,255.31

Net deficiency, $29,086.77

Reference is made to your protest dated October 27, 1927, against the determination of your tax liability as set forth in bureau
36 letter dated October 21, 1927, covering the years 1923 to 1925, inclusive.

You are advised that after due consideration of your protest, together with the information submitted during the conference held November 16, 1927, and the subsequent information submitted in your brief dated December 15, 1927, your tax liability has been redetermined in accordance with your contentions wherein the fees for raising mortgage loans were allowed as a deduction in the year in which incurred.

The result of the determination, in accordance with the foregoing conclusion, is as follows:

1923		
Net income as reported		$42,042.53
Additions:		
1. 1922 expenses	$230.11	
2. Profit on sale of real estate	14,000.00	14,230.11
		$56,272.64
Deductions:		
3. Excessive profit on sale of real estate	$5,987.27	
4. Post sale expenses	32.25	
5. Additional depreciation, 82nd Street and Broadway	8,418.74	
6. Increase depreciation	10,054.84	
7. Expenses paid in 1926	1,000.00	
8. Excess of fees incurred and paid	33,815.41	59,308.51
Net income as adjusted (loss)		(83,035.87)

37 EXPLANATION OF ADJUSTMENTS

(1) This represents 1922 expenses of post sale items paid in 1923 in connection with property which was sold in 1922.

(2) Since the profit on sale of northwest corner of Kingsbridge Road and Creston Avenue is a completed transaction, which sale was consumated during the year 1923, the amount of $6,000.00 received during the year 1924 and the amount of $8,000.00 received during the year 1925 have been considered income during the current year and the income for the years 1924 and 1925 has been reduced by $6,000.00 and $8,000.00, respectively.

(3) The property of 2055–2065 Creston Avenue having been sold and treated as a completed transaction during the year 1923, the bills for furnishings and equipment amounting to $5,987.27, which were received and paid during the year 1924, have been allowed as a deduction for the current year.

(4) Post sale expenses of $32.25 represents items paid in 1924 in connection with the property at northwest corner of Kingsbridge Road and Creston Avenue, which was sold in 1923.

(5) In accordance with your claim for additional depreciation on property, 82nd Street and Broadway, your contention has been allowed and depreciation increased in the amount of $8,418.74 in accordance with Schedule 1–A, revised, of the revenue agent's report.

38 (6) Increased depreciation has been allowed at the rate of 3%, as claimed in your brief. The increase of $10,054.84, as set forth by the agent in his report under item D, Schedule 1-A, revised, has been reviewed and approved.

(7) The item of $1,000.00 as expenses paid during the year 1926, account of northwest corner Kingsbridge Road and Creston Avenue, has been allowed.

(8) This item represents the excess of the mortgage expense fees incurred and paid over the amount deducted on the return. This is allowed in accordance with your protest and computed as follows:

Fees incurred (in accordance with your schedule attached to your letter dated December 15, 1927)		$65,849.54
Less:		
Deductions taken on return	$25,415.38	
82nd Street and Broadway	6,618.75	32,034.13
Difference		$33,815.41
Computation of tax:		
Net income (loss)		($3,035.87)
Tax liability		None.
Original assessment, account #404739		85,255.31
Overassessment		85,255.31

39 1924

Net income as reported (loss)		($67,574.31)
Additions:		
1. Additional cost of 2055-2065 Creston Avenue	$5,987.27	
2. Profit on sale of premises 82nd Street and Broadway	184,363.25	
3. Expenses northwest corner Kingsbridge Road and Creston Avenue	32.25	190,382.77
Total		$122,808.46
Deductions:		
4. Purchase-money mortgage receipts	$6,000.00	
5. Commissions, etc	22,217.00	
6. Depreciation, 82nd Street and Broadway	2,806.25	
7. Depreciation, 83rd Street and Boradway	8,250.10	
8. Increase depreciation	11,186.55	
9. Excess of fees incurred and paid	64,665.75	115,125.65
Net income as adjusted		$7,682.81

EXPLANATION OF ADJUSTMENTS FOR 1924

(1) See explanation of item (3) for the year 1923.

40 (2) The profit on the sale of the premises, 82nd Street and Broadway, has been approved as computed by the agent, the details of which are shown in Exhibit O, revised and amended.

(3) See explanation of item (4) for the year 1923.

(4) See explanation of item (2) for the year 1923.

(5) Commissions, etc., have been increased by $22,217.00 to allow as a deduction the expenses of sale of property, 82nd Street and Broadway, which expenses were deferred until 1925.

(6) Depreciation on the property at 82nd Street and Broadway has been allowed in the amount of $2,806.25 up to February 1, 1924, date of sale of property.

(7) Depreciation on the property at 82nd Street and Broadway has been increased by $8,250.10 to allow depreciation from October 1, 1924, to the end of the year in accordance with details as set out by the agent under Schedule 3–A, revised, item D.

(8) Depreciation has been increased from 2% to 3% in accordance with the computation as set forth in the agent's report under item E, Schedule 3–A, revised.

(9) See explanation of item (8) for the year 1923.

41	Fees incurred:		
	1325 Grand Concourse		$10,525.00
	82nd Street and Broadway		91,008.75
	Total		$101,533.75
	Deductions taken:		
	2655 Grand Concourse	$11,838.50	
	180th Street and Boston Road	3,375.00	
	2382 Grand Concourse	2,652.00	
	1325 Grand Concourse	1,052.50	
	Broadway, 82nd and 83rd Streets	17,950.00	36,868.00
	Difference		$64,665.75
	Computation of tax:		
	Net income		$7,682.81
	Less:		
	Net loss (section 206, revenue act of 1924)	$2,525.26	
	Exemption	2,000.00	4,525.26
	Balance taxable at 12½%		$3,157.55
	Tax liability		394.69
	Previously assessed		None.
	Deficiency		$394.69
42	Computation of statutory loss for 1923:		
	Net loss		$3,035.87
	Nontaxable interest		510.61
	Statutory loss		$2,525.26

1925

	Net income as reported (loss)		($28,040.46)
	Additions:		
	1. Profit on real estate, 83rd Street and Broadway	$377,732.44	
	2. Profit on real estate, 82nd Street and Broadway	20,252.02	
	3. Commissions	22,217.00	
	4. Profit on real estate, 180th Street and Boston Road	3,618.92	
	5. Net loss for 1924	67,574.31	$491,394.69
	Total		$463,354.23
	Deductions:		
	6. Purchase-money mortgage receipts	$8,000.00	
	7. Commissions	21,000.00	
	8. Post sale expenses	4,960.59	
	9. Depreciation, 83rd Street and Broadway	9,625.12	
	10. Depreciation, 2665 Grand Concourse	12,150.86	
	11. Excess of fees incurred and paid	146,483.92	202,220.49
	Net income as adjusted		$261,133.74

43 EXPLANATION OF ADJUSTMENTS

(1) Profit on sale of property at 83rd Street and Broadway has been approved as computed by the agent under Exhibit O, revised and amended.

(2) The profit on the sale of property, 82nd Street and Broadway, has been approved as computed by the agent under Exhibit P, revised and amended.

(3) Commissions have been decreased by $22,217.00, representing amount paid on the sale of property at 82nd Street and Broadway and which has been allowed as a deduction during the year 1924.

(4) The profit on sale of property at 180th Street and Boston Road has been increased by $3,618.92 on account of additional depreciation allowed during the years 1923 and 1924.

(5) Since there is a gain disclosed for the year 1924, the net loss as deducted has been disallowed.

(6) See explanation of item (2) for the year 1923.

(7) Commissions have been increased $21,000.00 to allow as an expense the amount paid on the sale of property of 83rd Street and Broadway.

(8) Post sale expenses of $4,960.59 paid in 1926 have been allowed during the current year and are made up of $4,500.00 ex-
44 penses in connection with the property, 180th Street and Boston Road, sold in 1925, and $460.59 of sundry accruals.

(9) Depreciation on the property, 83rd Street and Broadway, has been increased by $9,625.12.

(10) Depreciation has been increased from 2% to 3% in accordance with the computation as set out in item F, Schedule 5-A, revised.

(11) See explanation of item (8) for the year 1924.

Fees incurred:	
Listed in accordance with your schedule	$88,076.25
83rd Street and Broadway property	161,550.00
	$249,626.25
Less: Deduction taken on return per schedule	103,142.33
Difference	$146,483.92
Computation of tax:	
Net income	$261,133.74
Less: Exemption	None.
Balance taxable at 13%	$261,133.74
Tax liability	$33,947.39
Original assessment	None.
Deficiency	$33,947.39

45 The right of petition as indicated on page one of this letter refers only to any deficiency in tax indicated herein, inasmuch as there is no provision in the revenue act of 1926 granting the right of petition against the determination of any overassessment found upon an audit of your return.

The overassessment shown herein will be made the subject of a certificate of overassessment, which will reach you in due course through the office of the collector of internal revenue for your district, and will be applied by that official in accordance with section 284 of the revenue act of 1926.

A copy of this communication has been furnished your representative, Mr. George W. Perper, 11 West 42nd Street, New York, New York.

Payment of the tax should not be made until a bill is received from the collector of internal revenue for your district, and remittance should then be made to him.

Now, March 7, 1931, the foregoing amended petition certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

46 Before United States Board of Tax Appeals

[Title omitted.]

Answer to amended petition

Filed Feb. 20, 1930

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, for answer to the amended petition herein admits, denies, and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. (A) & (B) Admits that the taxes in controversy are corporation income taxes for the calendar years 1924 and 1925; avers that the commissioner determined deficiencies of $394.60 for 1924 and $33,947.39 for 1925; avers that the commissioner determined
47 an overassessment of $5,255.31 for the year 1923 and in connection therewith determined that deductions from income exceeded gross income for said year in the amount of $3,035.87, and that in determining the said deficiency for 1924 the commissioner allowed a statutory net loss for 1923 in the amount of $2,525.26.

4. (A) & (B) Admits that the commissioner has not allowed the full amount of mortgage expenses and fees incurred in connection with 82nd Street and Broadway and 83rd Street and Broadway properties, and that the allowance of deductions in respect thereof were $91,008.75 in the year 1924 and $161,550.00 in the year 1925; avers that said amounts were erroneously allowed as deductions from income in the years 1924 and 1925, whereas they should properly have been applied as capital adjustments in computing taxable profit from the sales of said properties in 1924 and 1925.

(C) Admits that the commissioner incorrectly computed petitioner's statutory net loss for the year 1923 to be applied as a deduction for the year 1924, and avers that the petitioner did not sustain a net loss for the year 1923.

(D) Denies the allegations of error contained in subparagraph (D) of paragraph 4 of the amended petition.

(E) & (F) Denies the allegations of error contained in subparagraphs (E) and (F) of paragraph 4 of the amended petition
48 unless the contentions of the commissioner hereinafter set forth be sustained in respect of the deductions for mortgage fees and expenses, in which event it is admitted that a downward revision should be made in the profits taxable for the year 1925 on the sale of the property at 83rd Street and Broadway, and for the year 1924 on the sale of the property at Broadway and 82nd Street.

(G) Respondent affirmatively alleges that in determining the deficiencies for the years 1924 and 1925 the commissioner erred as follows:

(1) The commissioner determined that petitioner sustained a net loss for the year 1923 and in computing the same allowed deductions on account of mortgage fees incurred in the year 1923 in the total amount of $65,849.54, whereas the correct amount of the allowable deductions for mortgage fees and expenses incurred in the year 1923 and prior years did not exceed $32,034.13. By reason thereof it should have been determined that the petitioner received taxable net income in the year 1923 and did not sustain a statutory net loss deductible in computing income for the year 1924.

(2) In computing net income for the year 1924 the commissioner allowed deductions on account of mortgage fees and expenses incurred during the year 1924 and prior years in the total amount of $101,533.75, whereas the amount properly deductible on account of such mortgage fees and expenses did not exceed $36,868.00.
49 (3) In computing income for the year 1925 the commissioner allowed deductions from income on account of mortgage fees and expenses incurred in the year 1925 and prior years in the total amount of $249,646.25, whereas the amount properly deductible on account of such mortgage fees and expenses did not exceed $103,142.33.

(4) If it be held that the commissioner erred as alleged in subparagraphs (1), (2), and (3) above, the respondent admits that downward revisions should be made in the taxable profits realized in the years 1924 and 1925 on account of the sale of the premises at 82nd Street and Broadway and 83rd Street and Broadway by adjusting the cost basis of the property at 82nd Street and Broadway by the sum of $91,008.75, and by adjusting the cost basis of the property at 83rd Street and Broadway by the sum of $161,550.00, representing unamortized mortgage fees and expenses in relation to said properties.

5. (A) Admits that the total mortgage fees in connection with 82nd Street and Broadway property amounted to $97,627.50 and that

the commissioner has allowed as a deduction in the year 1924 the amount of $91,008.75 on account thereof.

(B) Admits that the total mortgage fees in connection with 83rd Street and Broadway property amounted to $179,500.00 and that the commissioner has allowed as a deduction in the year 1925 the amount of $161,550.00 on account thereof.

50 (C) Admits the allegations of fact contained in subparagraph (C) of paragraph 5 of the amended petition, but denies that said mortgage fees constituted in their entirety ordinary and necessary expenses of petitioner's business in the respective years in which incurred.

(D) & (E) Denies that any amount of said mortgage fees and expenses re 82nd Street and Broadway in excess of $6,618.75 should have been allowed as a deduction in the year 1923; denies that the petitioner sustained a statutory net loss for 1923 of $100,152.76 or any other amount which should be applied as a deduction in computing income for 1924 under section 206 of the revenue act of 1924.

(F) Admits the allegations contained in subparagraph (F) of paragraph 5 of the amended petition.

(G) & (H) Denies the allegations contained in subparagraphs (G) and (H) of paragraph 5 of the amended petition.

(I) Admits that the said item of $3,336.81 was entered on the petitioner's books in the year 1924.

(J) Admits that the commissioner failed to eliminate from 1924 income said item of $3,336.81.

(K) & (L) Admits the allegations contained in subparagraphs (K) and (L) of paragraph 5 of the amended petition.

51 (M) Admits the allegations contained in subparagraph (M) of paragraph 5 of the amended petition, and alleges that in addition thereto the petitioner received and realized in the year 1925 the equivalent of cash in the amount of $77,967.00 by reason of the assumption by the purchaser of the mortgages on said premises, the mortgages so assumed being to secure loans in the amount of $1,600,000 obtained by the petitioner in the year 1924, the amount thereof exceeding the basis of said property to the taxpayer by the amount of $77,967.00.

(N) Admits the allegations contained in subparagraph (N) of paragraph 5 of the amended petition except that it is conceded (in the event it be finally held that unamorftized mortgage fees in the amount of $161,550.00 should be used as an adjustment to cost in computing profit from said sale) that the gross profit on said sale would be $481,417.00 instead of the amount alleged in sub-paragraph (N).

(O) Denies the allegations contained in sub-paragraph (O) of paragraph 5 of the amended petition, and alleges that the total "contract price" computed in accordance with the law and regulations (if no adjustment be made on account of unamortized mortgage fees) is $565,000.00 plus $77,967.00, a total of $642,967.00.

(P) Denies the allegations contained in sub-paragraph (P) of paragraph 5 of the amended petition; alleges that under the law and regulations the initial payment (if no adjustment be
52 made on account of unamortized mortgage fees) was $300,000.00 plus $77,967.00 (the excess of the mortgages assumed over the basis), and that during the year 1925 the petitioner received payments of installments on the purchase-money mortgage in the amount of $2,000.00.

(Q), (R), & (T) Denies (in the event it be held that no adjustment should be made on account of unamortized mortgage fees) that the taxable profit for 1925 on the installment basis on account of the sale of the premises at 83rd Street and Broadway is less than $379,967.00, as determined by the commissioner.

(S) Admits the allegations contained in sub-paragraph (S) of paragraph 5 of the amended petition, and avers that in determining the deficiency for 1925 the commisioner gave credit for the amount of said profit so reported.

(U) (a) and (b) Admits the allegations contained in sub-sections (a) and (b) of sub-paragraph (U) of paragraph 5 of the amended petition, except it is conceded (in the event it be finally held that unamortized mortgage fees in the amount of $91,008.75 should be used as an adjustment to cost in computing profit from said sale) that the gross profit on said sale would be $467,667.77 instead of the amount alleged in sub-section (b).

(c) & (d) Denies the allegations contained in sub-sections (c) and (d) of sub-paragraph (U) of paragraph 5 of the amended
53 petition; alleges that under the law and regulations the total contract price was $1,000,000.00, and the initial payment $300,000.00, and that during the year of sale the petitioner received an installment of $30,000.00 on the purchase-money mortgages.

(e) & (f) Denies (in the event it be held that no adjustment should be made on account of unamortized mortgage fees) that the taxable profits for 1924 and 1925 on the installment basis on account of the sale of the premises at 82nd Street and Broadway are less than $184,363.25 and $20,252.02, respectively, as determined by the commissioner, but admits that the taxable profit for 1925 on account thereof should be increased if the petitioner's contention in said respect be finally allowed.

Denies generally and specifically each and every allegation contained in the amended petition not hereinbefore admitted, qualified, or denied.

6. Respondent further alleges as follows:

During all times material hereto the business of the petitioner consisted of the acquisition, improvement, rental, operation, and sale of real estate. Its income consisted principally of interest on investments, rentals from properties so rented and operated, and profits on the sale of improved real estate. During 1923, 1924, and 1925 and prior thereto the petitioner, in order to finance the conduct of

its business, including the construction of improvements on its real estate, obtained a number of loans, securing the same by mortgages upon its real estate and by pledging purchase-money mort-
54 gages receivable on other real estate already sold. In order to obtain such loans, the petitioner incurred and paid certain fees, bonuses, or commissions, which were accrued on its books under the designation of "prepaid raising mortgage expense," and which will be hereinafter referred to for convenience as "mortgage fees." The purposes of said loans were to pay off existing mortgages on properties, to pay current obligations in the form of notes and open accounts to contractors for construction work, to purchase additional properties, and to pay general operating expenses of the company. The cash received from these loans was merged with other cash received from rental income, sale of properties, and other sundry income, and out of the entire cash funds withdrawals were made from time to time for the above-mentioned purposes.

At all times material hereto the petitioner employed the accrual method of accounting in keeping its books and records, and in making its Federal income tax returns. On its books and in its returns the above-mentioned mortgage fees were capitalized as prepaid expense, and amortized by way of deductions from income over the lives of the respective loans; and in the case of the sale and disposition of any of the mortgaged property the unamortized portion of the mortgage fees relating thereto was written off at the time of such sale. The unamortized amount of said mortgage fees as of December 31, 1922, as shown by the petitioner's books, was $44,500.84. The correct amounts of said mortgage fees to be amortized and deducted from income in the years 1923, 1924, and 1925 are as follows:

55 1923—$32,034.13, including $6,618.75 applicable to petitioner's property at 82nd Street and Broadway.
1924—$36,858.00, including $17,950.00 applicable to petitioner's property at 83rd Street and Broadway.
1925—$103,142.33.

In determining the deficiencies the commissioner allowed deductions on account of said mortgage fees as follows:

1923	$65,849.54
1924	101,533.75
1925	249,626.25

In determining the deficiency for 1924 the commissioner found that the petitioner's statutory deductions for 1923 exceeded its gross income for 1923 by the amount of $3,035.87 and allowed in the year 1924 a statutory net loss of $2,525.26.

During the year 1924 the petitioner sold and disposed of its property at 82nd Street and Broadway and at the time of said sale the unamortized mortgage fees in respect of the mortgages on said property amounted to $91,008.75. The profit from said sale was determined by the commissioner to be properly computed on the installment basis. Respondent avers that the amount of said un-

amortized mortgage fees should properly be applied as an adjustment to the cost basis of the property in computing the profit from said sale, and that said sum should not be allowed as an ordinary expense deduction in 1924 or in any other year. During the year 1925
56 the petitioner sold and disposed of its property at 83rd Street and Broadway and at the time of said sale the unamortized mortgage fees in respect of the mortgages on said property amounted to $161,550.00. The profit from said sale was determined by the commissioner to be properly computed on the installment basis. Respondent avers that the amount of said unamortized mortgage fees should properly be applied as an adjustment to the cost basis of the property in computing the profit from said sale, and that said sum should not be allowed as an ordinary expense deduction in 1925 or in any other year.

Wherefore, it is prayed that the board determine that the petitioner did not sustain a statutory net loss for 1923, and that the board redetermine the correct amounts of the deficiencies for the years 1924 and 1925 even though the amounts thereof be greater than the deficiencies determined by the commissioner.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
F. R. SHEARER,
Special Attorney, Bureau of Internal Revenue.

Now, March 7, 1931, the foregoing answer to amended petition certified from the record as a true copy.

[SEAL.]
B. D. GAMBLE.
Clerk, U. S. Board of Tax Appeals.

57 Before United States Board of Tax Appeals

Docket No. 36950. Promulgated April 30, 1930

S. AND L. BUILDING CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Findings of fact and opinion

19 B. T. A.—

1. MORTGAGE FEES.—Commissions and fees for securing loans on mortgages are not deductible in full in the year when paid or incurred, but should be spread proportionately over the life of the mortgages and when the mortgages are paid off or the property sold and the mortgage assumed by a third person, the unamortized portion of such mortgage fees may be charged off and deduction taken from gross income.

2. INSTALLMENT SALE—MORTGAGE.—In the case of an installment sale of mortgaged realty the amount of the mortgage must be deducted from the original agreed consideration to arrive at the total contract price in order to fix the basis for computation of the percentage of profit.

58 3. ACCOUNTING.—Where petitioner reported certain contract adjustments as income for 1924, and this was in accordance with its method of accounting and respondent made no change relative thereto, no change will now be made on petitioner's claim that they should have been reported for a previous year.

George W. Perper, C. P. A., for the petitioner.

F. R. Shearer, Esq., for the respondent.

Petitioner seeks redetermination of deficiencies of $394.69 for the calendar year 1924 and $33,947.39 for the year 1925. Respondent determined an overassessment for 1923 in the amount of $5,255.31. Respondent amended his pleadings and is claiming increased deficiencies for the years 1924 and 1925. The calendar year 1923 is involved herein on account of the respective claims of the parties in respect of a statutory net loss for the year 1923 deductible in computing taxable net income for the succeeding years.

The matters in controversy relate to the following:

(*a*) The proper treatment in computing income for the calendar years 1923, 1924, and 1925 of certain expenditures incurred by the petitioner in obtaining loans as hereinafter set forth.

(b) The proper computation of installment sales income on
59 account of the sale of the petitioner's property at 82nd Street and Broadway.

(c) The proper computation of installment sales income on account of the sale of the petitioner's property at 83rd Street and Broadway.

(d) Whether an item of $3,336.81 or any part thereof, referred to in the petition, should be eliminated from income for the year 1924.

Part of the facts in this proceeding were developed at the hearings and part were stipulated by the parties.

FINDINGS OF FACT

The petitioner is a New York corporation with its principal office at 2382 Grand Concourse, New York, New York.

During all times material hereto the business of the petitioner consisted of the acquisition, improvement, rental, operation, and sale of real estate. Its income consisted principally of interests on investments, rentals from properties so rented and operated, and profits on the sale of improved real estate. During 1923, 1924, and 1925 and prior thereto, the petitioner, in order to finance the conduct of its business, including the construction of improvements on its real estate, obtained a number of loans, securing the same by mortgages upon its real estate and by pledging purchase-money mort-
60 gages receivable on other real estate already sold. In order to obtain such loans the petitioner incurred and paid certain fees,

bonuses, or commissions, which were accrued on its books under the designation of "prepaid raising mortgage expense," and which will be hereinafter referred to for convenience as "mortgage fees." The purposes of said loans were to pay off existing mortgages on properties, to pay current obligations in the form of notes and open accounts to contractors for construction work, to purchase additional properties, and to pay general operating expenses of the company. The cash received from those loans was merged with other cash received from rental income, sale of properties, and other sundry income, and out of the entire cash funds withdrawals were made from time to time for the above-mentioned purposes.

At all times material hereto petitioner employed the accrual method of accounting in keeping its books and records, and in making its Federal income tax returns. On its books and in its returns the above-mentioned mortgage fees were capitalized as prepaid expense, and amortized by way of deductions from income over the lives of the respective loans; and in the case of the sale and disposition of any of the mortgaged property the unamortized portion of the mortgage fees relating thereto was written off at the time of such sale. The unamortized amount of said mortgage fees as of December 31, 1922, as shown by the petitioner's books, was $44,500.84.

During the years 1923, 1924, and 1925 the petitioner obtained the following-described loans and incurred mortgage fees as follows:

61

	Amount to loan	Term of loan	Mortgage fees incurred in obtaining loan
1923			
2665 Grand Concourse	$175,000.00	5 years	$30,000.00
180th St. & Boston Road:			
1st mortgage	220,000.00	10 years	7,750.00
2nd mortgage	60,000.00	5 years	13,000.00
184th St. & Grand Concourse:			
1st mortgage	45,000.00	5 years	4,614.54
2nd mortgage	50,000.00	6 years	10,485.00
82nd St. & Broadway:			
1st mortgage	1,100,000.00	10 years	56,167.50
2nd mortgage	200,000.00	7 years	41,460.00
Total			$163,477.04
1924			
1325 Grand Concourse	$260,000.00	10 years	$10,525.00
83rd St. & Broadway:			
1st mortgage	1,100,000.00	10 years	54,250.00
2nd mortgage	500,000.00	10 years	125,250.00
Total			$190,025.00
1925			
S. E. corner of 101st St. & Broadway	$1,900,000.00	On demand	$63,593.50
205 W. 100th St.	35,000.00	1 year	932.49
206 W. 101st St	90,000.00	1 year	2,143.26
General loan	125,000.00	2 years	13,750.00
General loan	100,000.00	1 year	5,157.00
General loan	50,000.00	2 years	2,500.00
Total			$88,076.25

62 If it be held as a matter of law that such mortgage fees are deductible in computing taxable income entirely in the year in which incurred, the parties are agreed that the amounts hereinabove set forth are the correct amounts to be used in computing the deductions on that account.

If, as a matter of law, said mortgage fees should properly be capitalized and amortized over the lives of the loans, and the unamortized portion written off at the time the mortgaged property is disposed of, the parties are agreed that the correct amounts so deductible in computing taxable income for the years 1923, 1924, and 1925 (including the amounts deductible in said years on account of mortgage fees incurred prior to 1923, as set forth in the second preceding paragraph) are as follows:

	1923	1924	1925
2665 Grand Concourse	$9,338.50	$11,838.50	$11,838.50
180th St. & Boston Road	1,668.00	3,375.00	15,707.00
184th St. & Grand Concourse	928.33	2,652.00	2,652.00
Kingsbridge & Fordham	733.34		
2055-2065 Creston Ave	12,747.21		
82nd St. & Broadway	6,618.75	91,008.75	
1325 Grand Concourse		1,052.50	1,052.50
83rd St. & Broadway		17,950.00	161,550.00
S. E. corner 101st St. & Broadway			63,593.59
205 W. 100th St			932.49
206 W. 101st St			2,143.26
Three general loans described in preceding paragraph			5,223.08
Totals	$32,034.13	$127,876.75	$264,692.33

63 During the year 1924 the petitioner sold and disposed of the premises at 82nd Street and Broadway. The sales price was $2,100,000 made up as follows:

Cash	$300,000.00
First mortgage assumed	1,100,000.00
Purchase-money mortgage given by purchaser	700,000.00
Total	2,100,000.00

Said property was acquired by the taxpayer after March 1, 1913. Its depreciated cost at the time of sale (without adjustment on account of unamortized mortgage fees) was $1,541,323.48, leaving a profit to be reported (without adjustment on account of said mortgage fees) in the amount of $558,676.52. The respondent contends that in computing the profit on the sale of these premises an adjustment to cost should be made on account of unamortized mortgage fees incurred in 1923 in respect of said property. The parties are agreed that the correct amount of such unamortized mortgage frees in the year of sale is $91,008.75, if it be held that such mortgage fees should not have been deducted in their entirety in the year 1923. If such adjustment be proper, the net depreciated cost was $1,632,332.23, leaving a profit to be reported on account of said sale in the amount of $467,667.77. If it be held that said mortgage fees are deductible in the year 1923 when incurred, or if it be held that said unamortized portion thereof is deductible as ex-

64 pense in the year of sale (rather than being taken into consideration as an adjustment of the profit on the sale) then the parties are agreed that the correct profit would be $558,676.52 as above stated. In addition to the cash of $300,000 received at the time of sale, the taxpayer received during the year 1924 the amount of $30,000 as installments on the purchase-money mortgage. During the year 1925 the petitioner received payments on said purchase-money mortgage in the amount of $36,250. The mortgage of $1,100,000 assumed by the purchaser provided that the principal sum thereof was payable in installments of $22,000 on December 1, 1924, and $22,000 every six months thereafter until April 9, 1933, when the entire balance should become due and payable. In accordance with the agreement of sale the purchaser paid to the holders of said mortgage in 1924 the amount of $22,000, and in 1925, the amount of $44,000.

During the year 1925 the petitioner sold and disposed of the premises at 83rd Street and Broadway. The sales price was $2,165,000, made up as follows:

Cash	$300,000.00
First mortgage assumed	1,100,000.00
Second mortgage assumed	500,000.00
Purchase-money mortgage given by purchaser	265,000.00
Total	$2,165,000.00

Said property was acquired by the taxpayer after March 1,
65 1913. Its depreciated cost at the time of sale (without adjustment on account of unamortized mortgage fees) was $1,522,033.00, leaving a profit to be reported (without adjustment on account of said mortgage fees) in the amount of $642,967. In addition to the cash payment of $300,000, the petitioner received on the purchase-money mortgage during the year 1925 the sum of $2,000. If no adjustment be made in the year of sale on account of unamortized mortgage fees, the first and second mortgages assumed by the purchaser exceeded the basis of such property to the taxpayer in the amount of $77,967. In connection with this sale the respondent makes the same contention, in regard to an adjustment to cost in respect to unamortized mortgage fees incurred in 1924, as set forth in the preceding paragraph, in connection with the sale of the premises at 82nd Street and Broadway. If an adjustment on account of unamortized mortgage fees be proper in computing profit from the sale of said property, the parties are agreed that the correct amount to be used in said adjustment is $161,550, which would result in a net depreciated cost of $1,683,583, leaving a profit to be realized in the amount of $481,417. The loan secured by the first mortgage on said property in the amount of $1,100,000 was obtained by the petitioner in the year 1924, the terms thereof providing that the principal sum should be payable in installments of $16,500, payable May 1, 1926, and $16,500 every six months thereafter until April 9, 1933, when the entire balance should

become due and payable. The loan secured by the second
66 mortgage on said property in the amount of $500,000 was obtained by the petitioner during the year 1924, and provided that the principal sum should be payable in installments of $7,500 on May 7, 1925, and $7,500 every three months thereafter until November 7, 1934, when the entire balance should become due and payable. In the year 1925 the purchaser paid to the holders of the second mortgage the amount of $22,500 in respect to said installments.

In determining the deficiencies the respondent included in the petitioner's income for the year 1924 a realized profit on the sale of the property at 82nd Street & Broadway in the amount of $184,363.25, computed on the installment basis as follows:

Profit to be realized	$558,676.52
Contract price	1,000,000.00
Percentage of profit	55.867652%
Cash payment plus installments received on purchase-money mortgage	$330,000.00
55.867652% times $330,000 equals	$184,363.25

In determining the deficiencies the respondent included in the petitioner's income for the year 1925 realized profit on account of the sale in 1924 of said property at 82nd Street and Broadway in the amount of $20,252.02, computed by multiplying the installment payments received during 1925 in the amount of $36,250 by 55.867652 per cent.

In computing the deficiencies the respondent included in the
67 petitioner's income for the year 1925 profits realized on the sale during the year 1925 of said property at 83rd Street and Broadway in the amount of $379,967 computed on the installment basis as follows:

Profit to be realized	$642,967.00
Contract price (without adjustment on account of excess of mortgages assumed over the basis)	565,000.00
Percentage of profit	100% plus
Initial payment	300,000.00
Installments received on purchase-money mortgage	2,000.00
Liability on bond and mortgage cancelled (being the excess of the mortgages assumed over the basis of the property to the taxpayer)	77,967.00
Profit to be reported, 1925	379,967.00

On petitioner's income-tax return for the year 1924 there was reported as income an item reading as follows:

Premises No. 2608 Creston Ave., sundry allowances received from contractor after sale of premises	$3,336.81

In determining the deficiencies the respondent made no adjustment in respect to this item and did not eliminate the amount from the petitioner's income for the year 1924.

This item is in connection with a building which petitioner
68 constructed at No. 2608 Creston Avenue during 1922, which was completed in December of that year. Final settlement was not made with a number of contractors and material men until

1924, when certain allowances were made to petitioner by the contractors for excess material returned, omission of work or inferior work or material, or other causes. These allowances aggregated $3,336.81 and were credited to profit and loss by petitioner and returned by it as income for 1924. This was in accordance with the regular method and practice of petitioner in keeping its accounts, up to that time; viz, these adjustments were set up after the building was completed and sold, and were entered as of the time when made.

In determining the deficiencies the respondent allowed as a deduction in computing taxable net income for the year 1924 a statutory net loss sustained in 1923 computed as follows:

Net loss (before adjustment for non-taxable item)	$3,035.87
Non-taxable interest	510.61
Statutory net loss	$2,525.26

It is agreed that the correct amounts of non-taxable interest to be taken into consideration in computations of statutory net losses are $510.61 for 1923 and $637.54 for 1924, respectively.

69 OPINION

BLACK: In the recent case of Julia Stow Lovejoy (18 B. T. A. 1179) we held that fees, commissions, and expenses in obtaining a loan on mortgage were in the nature of capital expenditures and were not deductible in full in the year when paid or incurred, but should be spread proportionately over the term of the mortgage. That case is controlling here and the contention of petitioner that the mortgage fees should be deducted in the year when paid is denied in so far as such mortgage fees were paid in securing loans extending beyond the period of one year.

But the further question arises in this proceeding: How should the unamortized portion of these mortgage fees be treated in the year when the mortgaged property is sold and the mortgage is assumed by the purchaser? Should such unamortized portion of such fees be fully charged off in the year in which the sale is made, or should it at the time of sale be added to the capital cost of the property and in that manner be recovered tax free by the seller in reducing his profits on the sale?

There would be no difference in either method so far as the taxpayer's net income is concerned, if the sale is one where all the profit must be reported in the year of sale; but if the transaction is an installment sale under the statute, so that the period of reporting the profit on the sale may be spread over a period of years, then the practical effect of including unamortized mortgage fees as a capital adjustment is to spread the deduction over the period during
70 which the taxpayer is receiving the deferred payments and reporting the income from them. Now which is the correct method? The commissioner contends that the unamortized mort-

gage fees should be added to the cost of the property and in that way be recovered tax free by the seller in the sale.

Mortgage fees paid to secure a loan such as those involved in this proceeding do not represent cost of porperty but represent cost of the use of money borrowed. The purposes of the loans involved in this proceeding were to pay off existing mortgages on properties, to pay current obligations in the form of notes and open accounts to contractors for construction work, to purchase additional properties, and to pay general operating expenses of the company. The cash received from those loans was merged with other cash received from rental income, sale of properties, and other sundry income and out of the entire cash funds withdrawals were made from time to time for the above-mentioned purposes. Under such circumstances we think it would be altogether improper to say that the mortgage fees paid to secure such loans represented a part of the cost of the property mortgaged.

If A owns an apartment house worth $100,000 and needs some money and borrows $50,000 due in ten years and puts his apartment house up as security, and in addition to the regular rate of interest pays a $5,000 mortgage fee to get the money, under such circumstances we have held that he can not take the $5,000 as a de-
71 duction in the year that the loan is made and the mortgage fee is paid but the deduction must be spread over the life of the loan. (Cf. Chicago, Rock Island and Pacific R. R. Co., 13 B. T. A. 988; U. S. Playing Card Co., 15 B. T. A. 975.) But when A comes to sell his apartment house the year following the year in which the loan was made and the purchaser agrees to assume the mortgage, A does not add the $5,000 mortgage fee to the cost of his house. It has nothing to do with the cost of his house. He, having shifted the burden of his mortgage to other shoulders, stands in the same situation as if he had paid it off and therefore should be allowed to deduct the remaining portion of his unamortized mortgage fees.

In the instant case it is shown by stipulation of the parties that the petitioner accrued those items of mortgage fees on its books as "prepaid raising mortgage expense" and capitalized them thus and amortized them by way of deductions from income at rates which were properly related to the length of the loan.

It is further shown by stipulation of the parties that in the case of sale of any of the mortgaged property, the unamortized portion of the mortgage fees relating thereto was written off at the time of such sale. We think that is the proper accounting method and the commissioner should use it in computing the net income of the taxpayer for the respective years involved in this proceeding.

Petitioner alleges that respondent erred in his computation
72 of profit on the installment sale basis on the two properties located at 82nd Street and Broadway, and at 83rd Street and Broadway, and relies on the case of Schneider, Trustee of Bagby-Howe Drug Co., v. Lucas, decided August 3, 1929, Western District of Kentucky. This board, in Pachoco Creek Orchard Co. (12

B. T. A. 1358) and Dalraida Realty Co. (5 B. T. A. 905), had before it the construction of section 212 (d) of the revenue act of 1926, and regulations 69, articles 42–46, made in pursuance thereof, and we there held that the total contract price is the consideration named in the original agreement less the mortgage on the property, and that the sum thus found is to be used as the basis for the computation of percentage of profit. We think that is a correct interpretation of the statute, and we approve the action of the commissioner in so treating it.

Relative to the claim for deduction of the sum of $3,336.81 from income for 1924, petitioner claims that this item should properly have been included in its income for 1922 and should therefore be excluded from income for 1924. It claims that this was an error or neglect of its own accounting and should now be corrected.

It returned this sum as income for 1924, and it was so accepted by the respondent. It has not been shown that this was erroneous or unfair or that it did not clearly reflect petitioner's income. As petitioner made its return on the basis of its own system of accounting, we are of opinion that the respondent was correct in not eliminating this item. A similar principle was involved in
73 Charleston & Western Carolina Railway Co. (17 B. T. A. 569), where the railway company had accrued wages in one year, and which when unclaimed were subsequently credited to profit and loss in a later year, it was held to constitute income in the year when credited to profit and loss.

Reviewed by the board.

Judgment will be entered under rule 50.

A true copy. Teste:

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Now, March 7, 1931, the foregoing findings of fact & opinion certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

74 Before United States Board of Tax Appeals

Docket No. 36950

S. AND L. BUILDING CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

In pursuance of findings of fact and opinion promulgated in this proceeding on April 30, 1930, the respondent on June 17, 1930, filed his determination of the tax in words and figures as follows:

Calendar years:	Deficiency in tax
1924	None.
1925	$29,645.85

1924			Deficiency in tax
Net income as shown in the sixty-day letter dated February 4, 1928			$7,682.81
Adjustment allowed by the board:			
Mortgage fees allowed in the sixty-day letter	$101,533.75		
Mortgage fees agreed to (see board's decision)	127,876.75		26,343.00
Loss			$18,660.19
Tax liability			None.
Tax assessed			None.
Deficiency			None.

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1925			
Net income reported in the sixty-day letter			$261,133.74
Less:			
Additional mortgage fees allowed by board—			
Correct mortgage fees deductible		$264,692.33	
Mortgage fees deducted on return	$103,142.33		
Additional allowed in sixty-day letter	146,483.92	249,626.25	15,066.08
			$246,067.66
Less 1924 loss		$18,660.19	
Less 1924 nontaxable interest		637.54	18,022.65
Adjusted net income			$228,045.01
Amount of tax at 13%			$29,645.85
Tax assessed			None.
Deficiency in tax			$29,645.85

Petitioner contested the correctness of the above determination filed by the respondent in so far as it affects the year 1925, and on July 17, 1930, he filed his proposed alternative recomputation as follows:

"The commissioner, in his proposed redetermination of the deficiency covering the years 1924 and 1925, erred in applying
76 the board's decision promulgated April 30th, 1930, to the facts relating to the computation of profit in the year 1925 on the sale of 83rd Street and Broadway property, reported on the installment plan.

"Exception is taken only to the recomputation of deficiency for the year 1925. The commissioner, for the year 1925, determines the adjusted net income to be $228,045.01, arrived at by including therein $379,967.00 as profit realized in the year 1925 on the sale of 83rd Street and Broadway property computed on the installment basis. Petitioner contends that the correct method of computing profit realized on the sale of 83rd Street and Broadway property on the installment plan, as decided by the board in this case and in the Delraida Realty Co. (5 B. T. A. 905), is as follows (for figures presented here, see stipulation of facts, pages 7 and 8 and 10):

Original agreed consideration		$2,165,000.00
Less mortgages assumed		1,600,000.00
Total contract price (as the basis for computation of the percentage of total profit) determined by the board		$565,000.00

Total profit:		
Purchase price	$2,165,000.00	
Less net cost	1,522,033.00	$642,967.00
Percentage of total contract price to total profit		113.8%
77 Installment payments actually received in taxable year 1925:		
Initial payment	$300,000.00	
Installment on purchase money received	2,000.00	
Total		302,000.00
Reportable income, 1925: The correct amount of income to be returned in the year 1925 equals that proportion of the instalment payments actually received in the year 1925 which the total profit realized, or to be realized when the payment is completed, bears to the total contract price.		
Reportable income therefore equals 113.8%×$302,000.00		343,676.00
Commissioner determines the reportable profit to be		$379,967.00
The correct profit determined, as above		343,676.00
Excess profit reported by commissioner on 83rd Street and Broadway property for 1925		$36,291.00
Computation of tax:		
Adjusted net income, reported by commissioner (see page 2 of proposed redetermination) for 1925		$228,045.01
Less adjustment by petitioner of profit on sale of 83rd Street and Broadway property—		
78 Reported by Commissioner	$379,967.00	
Correct amount to be reported	343,676.00	
Total		$36,291.00
Corrected net income		$191,754.01
Correct amount of tax at 13%		$24,928.02
Amount computed by commissioner		29,645.85
Excess amount of tax computed by commissioner		$4,717.83 "

The final determination as proposed by the respondent and petitioner's alternative recomputation came on for hearing July 30, 1930, and after hearing the argument of counsel and carefully studying each of the proposed recomputations of tax, it appears that the only difference between the parties is as to the realized profit in 1925 from the sale of certain premises located at 83rd Street and Broadway. Respondent computed the realized profit from this transaction for the year 1925 to be $379,967 and petitioner computed the realized profits on such transaction for the purpose of arriving at the tax to be $343,676. The question is which of the two computations, if either, complies with the findings of fact and opinion promulgated by this board April 30, 1930.

79 A reading of the findings of fact and opinion promulgated by the board on April 30, 1930, in this proceeding will show that on page 8 and 9 of the findings of fact, we said:

" In computing the deficiencies the respondent included in the petitioner's income for the year 1925 profits realized on the sale during

the year 1925 of said property at 83rd Street and Broadway in the amount of $379,967 computed on the installment basis as follows:

Profit to be realized	$642,967.00
Contract price (without adjustment on account of excess of mortgages assumed over the basis)	565,000.00
Percentage of profit	100% plus
Initial payment	300,000.00
Installments received on purchase-money mortgage	2,000.00
Liability on bond and mortgage cancelled (being the excess of the mortgages assumed over the basis of the property to the taxpayer)	77,967.00
Profit to be reported, 1925	379,967.00"

On page 13 of the opinion we held that the total contract price is the consideration named in the original agreement less the mortgage assumed on the property and that the sum thus found is to be used as the basis for the computation of the percentage of profit. We said: "We think that is the correct interpretation of the stat-
80 ute and we have approved the action of the commissioner in so treating it." It is plain to our minds that the above quoted language of the opinion approved the computation of the realized profit on the sale of the property located at 83rd Street and Broadway as treated by the respondent in the deficiency letter and detailed on pages 8 and 9 of our findings of fact. It appears that in the final determination now submitted by the respondent that he treats the income received from the sale of this property located at 83rd Street and Broadway in the same way as he treated it in the original deficiency letter.

The respondent's determination of the tax filed herein June 17, 1930, is therefore held to be in accordance with the findings of fact and opinion promulgated in this proceeding April 30, 1930, and is therefore approved.

Ordered and decided: There is no deficiency for 1924; there is a deficiency in the tax against petitioner for the year 1925 of $29,645.85.

(Signed) EUGENE BLACK,
Member, United States Board of Tax Appeals.

Enter.

A true copy. Teste:

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Now, March 7, 1931, the foregoing order certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

81 In United States Circuit Court of Appeals for the Second Circuit

No. 36950. Term

S. & L. Building Corporation, petitioner

v.

David H. Blair, Commissioner of Internal Revenue, respondent

Petition for review

Filed Feb. 18, 1931

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

The S. & L. Building Corporation, a corporation duly organized under the laws of the State of New York, with its principal place of business in the city of New York, in support of this, its petition for review of the decision of the United States Board of Tax Appeals entered September 16th, 1930, finally determining a deficiency in income tax of the petitioner for the calendar year 1925 in the amount of $29,645.85, respectfully shows to this honorable court, as follows:

I

STATEMENT OF NATURE OF CONTROVERSY

82 1. That on February 4th, 1928, David H. Blair, Commissioner of Internal Revenue, respondent above named, pursuant to section 274 of the revenue act of 1926, advised the S. & L. Building Corporation, petitioner above named, that a deficiency of $34,342.08 for the years 1924 and 1925 was determined.

Thereafter, on April 2nd, 1928, petitioner duly filed with the United States Board of Tax Appeals its petition requesting a redetermination of said deficiency of $34,342.08 covering the years 1924 and 1925.

After several motions were made by the Commissioner of Internal Revenue for extension of time to file his answer, said answer was filed on April 2nd, 1929. Thereafter the case was tried February 3rd, 1930, at which time amendments to the petition were proposed by petitioner. With the consent of counsel for the commissioner, and by order of the board, an amended petition was filed by petitioner February 11, 1930. Thereafter, on February 20th, 1930, an answer to the amended petition was filed by the Commissioner of Internal Revenue.

That the amended petition under items (E) and (F) alleged as follows:

"(E) That the commissioner incorrectly computed taxable profit on Broadway & 83rd Street property, sold in the year 1925, by his failure to properly apply the installment sales provision of the law.

(F) That the commissioner incorrectly computed taxable profit on Broadway & 82nd Street property, sold in the year 1924, by his failure to properly apply the installment sales division of the law."

83 2. Thereafter, on April 30th, 1930, the United States Board of Tax Appeals rendered its decision and entered judgment pursuant to rule 50 of the rules of practice, before the United States Board of Tax Appeals. That the findings of fact embodied in this decision promulgated April 30th, 1930, pertinent to the issue raised in this appeal are as follows:

"During the year 1924, the petitioner sold and disposed of premises 82nd Street & Broadway. The sales price was $2,100,000.00 made up as follows:

Cash	$300,000.00
First mortgage assumed	1,100,000 00
Purchase-money mortgage given by purchaser	700,000.00
Total	$2,100,000.00

"Said property was acquired by taxpayer after March 1st, 1913. Its depreciated cost at the time of the sale was $1,541,323.48, leaving a profit to be reported in the amount of $558,676.52."

"In addition to the cash of $30 000.00 received at the time of sale, the taxpayer received during the year 1924 the amount of $30,000.00 as installments on purchase money mortgage. During the year 1925, the petitioner received payments on said purchase money mortgage in the amount of $36,250.00. That the mortgage of $1,100,-

84 000.00 assumed by the purchaser provided that the principal sum thereof was payable in installments of $22,000.00 on December 1, 1924, and $22,000.00 every six months thereafter until April 9th, 1933, when the entire balance should become due and payable. In accordance with the agreement of sale, the purchaser paid to the holders of said mortgage in 1924 the amount of $22,000.00 and in 1925 the amount of $44,000.00."

"In determining the deficiencies the respondent included in the petitioner's income for the year 1924 the realized profit on the sale of property at Broadway & 82nd Street in the amount of $184,363.25 computed on the installment basis as follows:

Profit to be realized	$558,676.52
Contract price	1,000,000.00
Percentage of profit	55.867652%
Cash payment plus installment received on purchase-money mortgage	330,000.00
55.867652% times $330,000.00 equals	184,363.25

"That during the year 1925 the petitioner sold and disposed of the premises at 83rd Street and Broadway. The sales price was $2,165,000.00 made up as follows:

Cash	$300,000.00
First mortgage assumed	1,100,000.00
Second mortgage assumed	500,000.00
Purchase-money mortgage given by purchaser	265,000.00
Total	$2,165,000.00

85 "Said property was acquired by the taxpayer, after March 1st, 1913. Its depreciated cost at the time of sale was $1,522,033.00 leaving a profit to be reported in the amount of $642,967.00."

"In addition to the casl. payment of $300,000.00 the petitioner received on the purchase money mortgage during the year 1925 the sum of $2,000.00. That the loan secured by the first mortgage on said property in the amount of $1,100,000.00 was obtained by the petitioner in the year 1924; the terms thereof provide that the principal sum should be payable in installments of $16,500.00 payable May 1, 1926, and $16,500.00 every six months thereafter, until April 9, 1933, when the entire balance should become due and payable. The loan secured by the second mortgage on the said property in the amount of $500,000.00 was obtained by the petitioner during the year 1924, and provided that the principal sum should be payable in installments of $7,500.00 on May 7th, 1925, and $7,500.00 every three months thereafter until November 7th, 1934, when the entire balance should become due and payable. In the year 1925, the purchaser paid to the holders of the second mortgage the amount of $22,500.00 in respect to said installments."

"That in computing the deficiencies the respondent included in the petitioner's income for the year 1925, profits realized on the sale during the year 1925 of said property of Broadway & 83rd
86 Street in the amount of $379,967.00 computed on the installment basis as follows:

Profit to be realized	$642,967.00
Contract price (without adjustment on account of excess of mortgages assumed over the basis)	565,000.00
Percentage of profit	100% plus.
Initial payment	$300,000.00
Installments received on purchase-money mortgage	2,000.00
Liability on bond and mortgage cancelled (being the excess of mortgages assumed over the basis of the property to the taxpayer)	77,967.00
Profit to be reported in 1925	379,967.00"

3. That the United States Board of Tax Appeals, in its decision promulgated April 30th, 1930, rendered its opinion relative to the issue raised herein, as follows:

"Petitioner alleges that respondent erred in his computation of profit on the installment-sale basis in the two properties located at 82nd Street & Broadway and at 83rd Street & Broadway and relies on the case of Schneider, Trustee of Bagby-Howe Drug Co., v. Lucas, decided August 3, 1929, Western District of Kentucky.
87 This board, in Pacheco Creek Orchard Co. (12 B. T. A. 1358) and Dalraida Realty Co. (5 B. T. A. 905) had before it the construction of section 212 (d) of the revenue act of 1926, and regulations 69, articles 42–46, made in pursuance thereof, and we there held that the total contract price is in the consideration named in the original agreement less the mortgage on the property, and that the sum thus found is to be used as the basis for the computation of percentage of profit. We think that is a correct interpretation of

the statute, and we approve the action of the commissioner in so treating it."

4. Thereafter, on June 17th, 1930, the Commissioner of Internal Revenue filed with the United States Board of Tax Appeals proposed redetermination and notice of settlement pursuant to rule 50 of the rules of practice, before the United States Board of Tax Appeals. Prior to the date set for hearing, July 30th, 1930, the petitioner on July 16th, 1930, filed with the board notice of objection to proposed redetermination and alternative recomputation setting forth the board's method of computation on the sale of 83rd Street & Broadway property reported on the installment plan.

Thereafter, on July 30th, 1930, final hearing was held before the board. Thereafter the board issued its order of final determination of tax approving respondent's determination filed June 17th, 1930. On September 16th, 1930, the order of final determination of tax was entered by the United States Board of Tax Appeals.

88 This order determined there is no deficiency for the year 1924; there is a deficiency in tax for the year 1925 of $29,645.85.

II

DESIGNATION OF COURT OF REVIEW

The petitioner being aggrieved by the said opinion, decision, and order, desires a review thereof by the United States Circuit Court of Appeals for the Second Circuit within which circuit is located the office of the collector of internal revenue to whom said petitioner made its income-tax returns.

III

ASSIGNMENT OF ERRORS

The petitioner makes the following assignment of errors:

1. That the board erred in holding, in the case of sale of real estate reported on the installment plan, where the purchaser assumed the unpaid mortgage loans which were originally obtained by the petitioner, that the "total contract price" to be used as the basis for the computation of percentage of profit is the consideration named in the original agreement less the mortgage on the property.

2. The Board erred in approving the commissioner's computation

89 of initial payment on 82nd St. & Broadway and 83rd St. & Broadway properties reported on the installment plan.

3. The board erred in approving the commissioner's computation of profits on the sale in the year 1925 of property at 83rd Street & Broadway reported on the installment plan, by including in said profits to be reported in the year 1925 an item representing the excess of mortgages assumed over the basis of the property to the taxpayer.

Wherefore, your petitioner prays that this honorable court may review said decision, opinion, and order, and reverse and set aside the same and that the clerk of the said United States Board of Tax Appeals be directed to transmit and deliver to the clerk of said court certified copies of all and every of the documents necessary and material to the presentation and consideration of the foregoing petition for review and as required by the rules of said court, statutes made and provided. And your petitioner will ever pray.

S. & L. BUILDING CORPORATION,
By SAM MINSKOFF, *President.*

GEORGE W. PERPER,
Attorney for Petitioner.
Office & P. O. address, 11 West 42nd Street, Manhattan Borough, New York City.

90 [*Duly sworn to by Sam Minskoff; jurat omitted in printing.*]

Now, March 7, 1931, the foregoing petition for review certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

91 Before United States Board of Tax Appeals

[Title omitted.]

Præcipe

Filed Feb. 18, 1931

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within sixty days from the date of the filing of the petition for the review in the above-stated case, transmit to the clerk of the United States Circuit Court of Appeals for the Second Circuit certified copies of the following documents:

1. The docket entries of proceedings before the United States Board of Tax Appeals in the case above entitled.
2. Pleadings before the board.
3. Findings of fact, opinion, and decision of the board.
4. Petition for review.

92 The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

GEORGE W. PERPER,
Attorney for S. & L. Building Corporation.

Dated, Feb. 18, 1931.

George W. Perper, attorney for S. & L. Building Corp., 11 West 42nd Street, New York, N. Y.

Now, March 7, 1931, the foregoing præcipe cert'fied from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

(3503)

93 In United States Circuit Court of Appeals for the Second Circuit

No. 41, October term, 1931

Argued May 16, 1932. Decided July 18, 1932

S. & L. BUILDING CORPORATION, APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE, APPELLEE

Appeal from the United States Board of Tax Appeals

Before L. HAND, AUGUSTUS N. HAND, and CHASE, Circuit Judges.

Appeal by the petitioner from an order of the Board of Tax Appeals, fixing a deficiency upon its income tax for the year 1925.

Leo H. Hoffman, of New York City, for appellant.

Andrew D. Sharpe, of Washington, D. C., for appellee.

Opinion

L. HAND, Circuit Judge:

The appeal involves the application of section 212 (d) of the revenue act of 1926 (26 U.S.C.A., § 953 (d)), which, although the transactions at bar happened in 1924 and 1925, section 1208 of the act (26 U.S.C.A., § 953a) made retroactive. It was designed to allow a taxpayer in the case of installment sales to spread the profit over the whole period during which payments were made, so as to avoid loading all of it upon those years which followed the amortization of the original cost. It gave a privilege; "the income may * * * be returned on the basis and in the manner above prescribed."

The petitioner had two parcels of realty in New York, each bought after March 1, 1913. It sold one in 1924, the other in 1925. It had previously placed one mortgage upon the first parcel, two upon the second. Each buyer paid a sum down, executed a purchase-money mortgage and assumed the payment of the existing mortgages. The petitioner chose to treat the sales as falling within section 212 (d), and the commissioner agreed; they differed as to how the tax should be calculated. Both found the profit by subtracting the depreciated cost, the "base," from the sum of the cash to be paid and the face of all the mortgages. The petitioner returned in both years that part of the profit calculated as follows: It added together the cash

actually paid and all payments made on any of the mortgages; this sum it considered "instalment payments actually received in that year." It applied to this amount a fraction of which the profit was the numerator, and the denominator was the sum of the cash to be paid and the face of all the mortgages. The commissioner took as the "installment payments actually received," the cash paid in any year, and all payments made upon the purchase-money mortgage; he excluded payments on the mortgages assumed. For the numerator of the fraction, like the petitioner he took the profit; but for the denominator he took the sum of the cash to be paid and the face of the purchase-money mortgage, excluding those assumed. In so doing he followed his regulation, made by virtue of the power given him by section 212 (d); regulations 69, article 44. Thus the differences between the parties arise first as to what should be considered the "installment payments actually received in that year," and second, as to what was "the total contract price." In general, the difference is whether the assumed mortgages shall be included in both factors.

The regulation in refusing to allow the payment of the assumed mortgages as "installments actually received," apparently con-
94 sidered the money borrowed as the seller's reimbursement pro tanto of the "base." The discharge of the loan is not therefore a receipt on the purchase price; money paid to his use is not "received" by him. No one can deny that this is the more natural sense to impose upon the phrase; a man does not "actually receive" what is paid to another. Yet in cases where the assumed mortgages exceed the "base," the regulation charges the seller with the whole excess at once. The sale at bar in 1925 was such a case. The regulation is inconsistent in these dispositions. If, when the assumed mortgages do not exceed the "base," payments are not "received" by the taxpayer, he can "receive" none, when they do. Indeed, the regu.ation goes even further; it makes the mere assumption an "installment actually received." No doubt, the excess must at some time be counted as profit; and it cannot be returned as of the time the money was borrowed, for the transaction is not then closed. There appears to be no intelligible way of dealing with it but to hold that the profit is received when the installments are paid. But if so, the same must be true when there is no excess.

Again, the regulation involves an equivocal use of the phrase, "total contract price." Obviously the denominator of the fraction to be applied to each "installment actually received," must be the sum of all such installments. If it be larger, the whole profit will never be covered. For this reason the regulation, which does not include among installments payments upon the assumed mortgages, excludes their face from the denominator. Yet in calculating the profit it necessarily includes the mortgages in the minuend, else there would ordinarily never be any profit. But the section, which necessarily implies that profit shall be reckoned by using a price which includes all the mortgages, can not mean something else when speaking of

the denominator of the fraction. In defining the condition upon the privilege in the case of realty it uses the phrase, "purchase price," but that has nothing to do with the question here; it touches not the calculation of the income to be returned but the right to spread the profit at all. Nevertheless, it is extremely improbable that it means anything else than "total contract price," and the commissioner here agrees that it includes assumed mortgages.

Thus it is apparent that no theory can be consistently applied which does no violence to the text; the fact is that the section was drawn without this situation in mind. It followed the lines of earlier regulations beginning with 1916, none of which had themselves dealt with the case of assumed mortgages. We of course agree that in such a situation the powers of the commissioner must be given wide latitude, especially perhaps, because the very section contains an express grant. But though he may impose any reasonable interpretation upon the language, and we should accept it, even though we independently thought otherwise, his gloss must be consistent; he may not read the same words in one sense in one connection and differently in another. We can see no escape from treating the phrase "installments actually received" as including payments made to the seller's use. Nor does this do great violence to the words. Though the seller has already received the money, he must repay it. The funds are his, to be sure; he may use them; but he is bound for their equivalent and it is not merely a figure of speech to regard his final quittance as that which assures their receipt. True, this may result in imposing a tax after direct payments have ended, and that would be unfair, if it was compulsory; but it is not, for the section merely gives an option, and the taxpayer may not object to what he can avoid.

We can not see that Lucas v. Schneider (47 F.(2d) 1006 (C. C. A. 6)) has any bearing on the situation here. The ruling would indeed deprive the petitioner of any recourse to the section at all, which the commissioner does not assert. As applied to the sale in 1925, it would also require us to treat the excess of the assumed mortgages over the "base" as "property" received at once. But we could scarcely stop there; we should be obliged to treat the whole of the assumed mortgages in the same way, and that would suit neither party. In any case Judge Denison seems to us to have been right in saying that the assumption of a mortgage is not "property" but "evidence of indebtedness." However that may be, we need here only decide whether the regulation is a correct interpretation of the statute as to the calculation of the return. We think that it is not, and that the petitioner is right in its insistence that payments reducing the assumed mortgages are to be included among "installments actually received." The rest follows.

Order reversed; cause remanded for further proceedings in accordance with the foregoing.

95 In United States Circuit Court of Appeals, Second Circuit

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the Post Office Building in the city of New York, on the 25th day of July, one thousand nine hundred and thirty-two.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

S. & L. BUILDING CORPORATION, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment

Filed July 26, 1932

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, reversed and cause remanded for further proceedings in accordance with the opinion of this court.

It is further ordered that a mandate issue to the said board in accordance with this decree.

WM. PARKIN, *Clerk.*

96 [File endorsement omitted.]

97 [Clerk's certificate to foregoing transcript omitted in printing.]

98 Supreme Court of the United States

Order allowing certiorari

Filed December 5, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 37172. U. S. Circuit Court of Appeals, Second Circuit. Term No. 475. David Burnet, Commissioner of Internal Revenue, petitioner, vs. S. & L. Building Corporation. Petition for a writ of certiorari and exhibit thereto. Filed October 25, 1932. File No. 37172.

U. S. GOVERNMENT PRINTING OFFICE: 1933